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VIA ECF

Hon. Katharine H. Parker
United States Magistrate Judge
United States District Court, Southern District of New York
Daniel Patrick Moynihan United States Courthouse
500 Pearl Street
New York, NY 10007

Re: Averbach et al. v. Cairo Amman Bank, 19-cv-00004-GHW-KHP
Letter Motion Requesting Approval of January 19, 2023, Transcript Errata

Dear Magistrate Judge Parker:

At Chambers' instruction, and at the request of the transcription service that prepared the transcript for the January 19, 2023, case management conference, we write jointly on behalf of the parties to request that the Court approve the proposed changes to the transcript attached hereto as a clean document in Exhibit A and a redline in Exhibit B.

Respectfully submitted,

/s/ Dina Gielchinsky

Encls.

cc: All Counsel

The parties' proposed revisions to the transcript from the January 19, 2023 case management conference are APPROVED. The parties shall send a copy of this order to the transcription service that prepared the transcript to request the revisions be implemented.

SO ORDERED:

Katharine H. Parker

HON. KATHARINE H. PARKER
UNITED STATES MAGISTRATE JUDGE 1/27/2023

Exhibit A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re: :
AVERBACH, et al., : Docket # 1:19-cv-00004-
Plaintiffs, : GHW-KHP
- against - :
CAIRO AMMAN BANK, : New York, New York
Defendant. : January 19, 2023
----- : TELEPHONIC CASE
----- : MANAGEMENT CONFERENCE

PROCEEDINGS BEFORE
THE HONORABLE KATHARINE H. PARKER,
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

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E X A M I N A T I O N S

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E X H I B I T S

<u>Exhibit Number</u>	<u>Description</u>	<u>ID</u>	<u>In</u>	<u>Voir Dire</u>
None				

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THE CLERK: Calling 19-cv-004, Averbach vs.

3

Cairo Amman Bank; the Honorable Katharine H. Parker,
4 presiding.

5

Beginning with counsel for the plaintiff,
6 please make your appearance for the record.

7

MS. DINA GIELCHINSKY: Good morning, Your
8 Honor. This is Dina Gielchinsky from Osen LLC on behalf
9 of the plaintiffs. I'm joined by my colleagues, Gary
10 Osen and Michael Radine.

11

THE CLERK: And, counsel for the defendant,
12 please make your appearance for the record.

13

MR. JONATHAN D. SIEGFRIED: Good morning, Your
14 Honor; Jonathan Siegfried appearing for CAB. I'm
15 joined by Andrew Peck, Erin Collins and Margaret
16 Civetta.

17

HONORABLE KATHARINE H. PARKER (THE COURT):
18 Good morning. Thank you for your flexibility in
19 switching to phone today. Because we are on the phone,
20 I ask that you keep your phones on mute unless you're
21 speaking and state your name before speaking. Also, I
22 remind you that the Court's conference line is open to
23 the press and public on a listen-only basis and that
24 court rules prohibit others from recording and
25 rebroadcasting court proceedings.

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2 So I think there's not too much to report based
3 on your recent letter to the Court, but I did want to
4 get an update on the jurisdictional discovery and also
5 talk about the anticipated motion that defendants want
6 to make.

7 So where are you on the discovery?

8 MS. GIELCHINSKY: Your Honor, I can start --
9 Dina Gielchinsky for the plaintiffs. We received -- as
10 we stated in our last status report, we received Arab
11 Bank's response to our subpoena advising us that they
12 were not able to locate responsive documents. That was
13 basically it under jurisdictional discovery.

14 With respect to Your Honor's second point, we
15 held a meet-and-confer with the defendant on January
16 13th, and we just restated our position that
17 jurisdictional briefing should wait until the District
18 Court issues its order on the R & R. And that remains
19 our position.

20 THE COURT: Okay. Let me hear what the defense
21 position is on the motion to dismiss. Why should it be
22 filed now, as opposed to waiting for a decision on the
23 R & R?

24 MR. SIEGFRIED: Certainly, Your Honor. Thanks
25 very much. This is Jonathan Siegfried speaking. Your

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2 Honor, last June at our first conference we raised
3 questions as to whether plaintiffs could actually
4 support the jurisdictional allegations in their Second
5 Amended Complaint. Recognizing that jurisdiction is a
6 threshold issue, you directed the parties to engage in
7 jurisdictional discovery and have overseen that
8 discovery for the last seven months. As plaintiffs
9 acknowledge that discovery is now completed and we are
10 prepared to proceed on our motion, which brings us to
11 the issue that plaintiffs now raise, which is that the
12 Court should wait for the District Court to rule on the
13 Report and Recommendation. Simply put, Your Honor,
14 plaintiffs are wrong on the law about that, and they're
15 asking the District Court to either ignore or rule on
16 the issue of specific jurisdiction without regard to the
17 facts.

18 Let me start with the law, because their legal
19 position is based on a fundamental misapprehension of
20 where we are. A renewed motion to dismiss under
21 12(b)(2), Your Honor, following jurisdictional discovery
22 is not simply addressed to the pleadings and involves an
23 entirely different legal standard than the pre-discovery
24 legal standard the Court applied in the R & R. Prior to
25 jurisdictional discovery, Your Honor, under well-

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2 established Second Circuit precedent, a plaintiff's
3 showing of jurisdiction may be established solely by
4 allegations in the pleading, which are deemed to be true
5 by the Court. It's quite clear, from what you precisely
6 state in the R & R.

7 THE COURT: Right.

8 MR. SIEGFRIED: It's the standard you applied.
9 You found that plaintiffs had made a *prima facie* showing
10 of personal jurisdiction based on the allegations in the
11 Complaint, which are deemed to be true, and from which
12 you drew all favorable inferences to plaintiffs. That
13 is not the legal standard following jurisdictional
14 discovery. The Second Circuit and numerous Courts in
15 this district have made clear that, following
16 jurisdictional discovery, a plaintiff's showing must be
17 factually supported. I think perhaps Judge Engelmayer
18 put it most succinctly in a couple of cases
19 (indiscernible) -- I'd refer you perhaps to *Paroni vs.*
20 *GE UK Holdings*, quote, "After jurisdictional discovery,
21 admissible evidence, not a party's pleading or say-so,
22 controls." So we begin with the fact that, given the
23 procedural posture of the case, we are dealing with an
24 entirely different legal standard than the legal
25 standard you applied, which frankly at the moment, Judge

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2 Woods has before him.

3 That brings -- as I said, they're wrong on the
4 law and I said they're wrong on the facts -- and that
5 brings us to the facts. The evidentiary record that has
6 been established in discovery, as we will show in our
7 motion, shows or provides evidence that directly
8 contradicts the allegations of the pleading, and in
9 other cases does not support it. And Your Honor is very
10 aware of one example in particular because it's been the
11 subject of several conferences. The Complaint alleges
12 that there were 21 transfers to four individuals through
13 CAB's correspondent account at Citibank, including six
14 transfers to one individual who was alleged to have
15 planned one of the attacks. The jurisdictional
16 discovery showed those allegations, which Your Honor
17 expressly referred to in the R & R and deemed to be
18 true, as you were required to, in fact could not be
19 factually supported and were indeed untrue. And you
20 have seen as a result that plaintiffs then changed their
21 entire argument about those transfers and came up with
22 what they call the nesting theory.

23 And of course that nesting -- they're putting
24 this -- it was not before you when you did the R & R,
25 it's not before Judge Woods. And we also know that the

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nesting theory has been rejected, at least by one Court in this district. And we further know, from the jurisdictional discovery, that it wouldn't even apply in this case even were the Second Circuit to uphold it.

So I know we're not going to get -- I don't want to go too deep into the merits here, but basically -- basically, Your Honor, what that argument means is that plaintiffs would have Your Honor stand aside, ignore what is now the evidentiary record and allow the District Court perhaps to adopt findings and conclusions in the R & R which you now know to be incorrect, such as the allegations regarding those transfers. And it would have the District Court rule on a motion based on a pre-discovery legal standard that is no longer relevant to the procedural posture of the case now and to do so without the evidentiary record that now exists and which is relevant to properly deciding whether personal jurisdiction exists.

The idea, Your Honor, that's behind plaintiffs' argument, that Your Honor should stand aside under these circumstances therefore is not only wrong on the law but would result in a total waste of the District Court's time and resources in ruling on that portion of the R & R, where as I said, both the legal standard is no longer

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2 the applicable legal standard under Second Circuit
3 precedent and where the facts are different. And
4 plaintiffs even acknowledge, at least with respect to a
5 number of the nesting transactions, that the facts are
6 different because they no longer claim that those
7 transactions even went through Citibank.

8 Now, I say we're not -- unless you want me to,
9 I'm not going further into the merits regarding all of
10 the other transactions, but the same types of issues
11 arise when you apply the facts that we now have through
12 jurisdictional discovery to the minimum contacts
13 analysis and the full minimum contacts analysis that is
14 to be applied under the due process clause but, again,
15 not on the basis of the allegations, the jurisdictional
16 allegations in the Complaint, which are at paragraphs
17 five through eight, but on the evidentiary record that
18 has been developed through the jurisdictional discovery
19 that you ordered and supervised and brings us to today.

20 So our argument and our position is that we
21 should proceed with the motion under the proper
22 standard, under the full evidentiary record, and that
23 Your Honor should rule on that, decide that, and then
24 what Judge Woods would have before him is a ruling on
25 jurisdiction that is made under both the proper legal

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2 standard and upon full evidentiary record rather than
3 ignoring all of that and ruling on something, as I said,
4 that the Second Circuit says is no longer procedurally
5 relevant.

6 One last point, if I might, Your Honor. And
7 that is -- I might also refer Your Honor to Judge
8 Engelmayr's decision in *Vasquez vs. HSBC* -- it's at 477
9 F.Supp. 3d 241. There, as here, Your Honor, the Court
10 denied an initial 12(b)(2) motion to dismiss direct to
11 the pleadings. There, as here, the Court ordered
12 jurisdictional discovery. There, as here,
13 jurisdictional discovery was completed. And there, as
14 here, upon completion of jurisdictional discovery, Judge
15 Engelmayr heard a renewed motion to dismiss under
16 12(b)(2), specifically distinguished between the pre-
17 and post-discovery standards and what he was to look at,
18 and then granted the jurisdictional motion to dismiss
19 that he had previously denied, applying the proper
20 standard applicable to the motion that was made at the
21 time. That is what we are suggesting that we do so that
22 we can engage in an efficient process for resolving the
23 threshold jurisdictional issue.

24 THE COURT: Okay. So if there's no
25 jurisdiction, that moots the remainder of the objection

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2 on the R & R or any decision on that remainder of the R
3 & R, as well.

4 MR. SIEGFRIED: Absolutely, which is another
5 reason for having it, that threshold issue, correctly
6 decided. It doesn't mean that -- I may have disagreed
7 and filed objections to your prior conclusion, but it
8 doesn't mean that you didn't apply the proper standards
9 to the pleadings as alleged and issued your reasoned
10 opinion. But what it does mean that we are -- you
11 obviously had the authority to order the jurisdictional
12 discovery. We are at that point in time, and so you
13 should have the opportunity to make that decision. If
14 you rule that way, if you rule in our favor this time,
15 then that is the issue that will go before Judge Woods;
16 and if you ruled in our favor, the defendant's favor, he
17 would not reach the 12(b)(6) issues. If you ruled
18 against us and he affirmed your ruling, then of course,
19 he would have to reach it. But he certainly wouldn't go
20 on right now -- not only is he (indiscernible) but would
21 be deciding on the wrong legal -- on the not
22 procedurally relevant legal standard and ignoring the
23 evidence with regard to jurisdiction, but he might also
24 then go on to just rule on the 12(b)(6) motion part that
25 he wouldn't even need to or properly reach. It cannot

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2 be that that is anything other than a waste of judicial
3 resources.

4 THE COURT: Right. Okay, so I agree that the
5 briefing should commence. When will defendant be in a
6 position to file a moving brief?

7 MR. SIEGFRIED: Your Honor, you may recall that
8 the plaintiffs gave us a chart, and they gave that same
9 chart to Your Honor, listing all of their transactions.
10 I don't believe that any of the discovery that occurred
11 subsequent to that chart resulted or would have resulted
12 in any additions to that chart. If that is the chart,
13 then we would be prepared to move forward with our
14 moving brief on, say, if you gave us a few weeks to --

15 THE COURT: (Indiscernible)

16 MR. SIEGFRIED: I'm sorry?

17 THE COURT: Could you do it by January 31?

18 MR. SIEGFRIED: We could, Your Honor. I think
19 that's a -- what is that, two weeks, I think, from where
20 we are today. I think I'd prefer three weeks, just
21 because we have a foreign client and therefore,
22 obviously, we would want to be able to draft and be able
23 to have them see what we're doing. So I'd prefer three
24 weeks; but if you wanted -- you know, required us to do
25 it by the 31st, we would do it.

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2 THE COURT: Are there any changes to the chart
3 that plaintiffs wanted to make?

4 MS. GIELCHINSKY: Yes, Your Honor. We can
5 send an updated chart.

6 And if I could just be heard also on
7 Mr. Siegfried's points? Because he brought up Vasquez,
8 which has a significant distinction from the procedural
9 posture here in that Judge Engelmayer denied the motion
10 to dismiss without prejudice and authorized
11 jurisdictional discovery. So a renewed 12(b)(2) motion
12 in that case procedurally is the way to go. Here, the
13 Report and Recommendation recommended denial but without
14 jurisdictional discovery. Jurisdictional discovery was
15 eventually ordered, but we have a Report and
16 Recommendation denying the defendant's motion to dismiss
17 on personal jurisdiction grounds. So, this would be a
18 successive motion to dismiss. What I'm hearing and what
19 I think would have to happen now is that the defendant
20 would need to move to vacate the Report and
21 Recommendation that's outstanding or somehow it would
22 need to be withdrawn for this to be procedurally
23 appropriate.

24 THE COURT: Well, they could also move for
25 summary judgment, couldn't they?

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MS. GIELCHINSKY: They could move for summary
judgment, yes; yes, they could --

4

THE COURT: Under Rule 56.

5

MS. GIELCHINSKY: Yes.

6

MR. SIEGFRIED: Your Honor, two points. First
of all, the 12(b)(2) motion post jurisdictional
discovery applies under, again, Second Circuit
precedent; and, again, Judge Engelmayer has this in his
decision, as do other courts. It applies the Rule 56
legal standards in terms of that the motion must be --
the plaintiffs are required to actually support the
allegations, affidavits are supposed to be -- are to be
on the basis of personal knowledge, documents have to be
authenticated. So the legal standard, the Rule 56 legal
standards is to admissibility of evidence and the like,
are all applicable. It doesn't have to be Rule 56
motions. Number two, the --

19

THE COURT: But in this case, if the Court
doesn't have subject matter jurisdiction, that can be
raised at any time.

22

MR. SIEGFRIED: Yes. I'm just simply saying
the point that Your Honor -- I didn't see that Your
Honor issued the Report and Recommendation with
prejudice, either.

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THE COURT: No. No, no.

3

MR. SIEGFRIED: Your Honor obviously ordered jurisdictional discovery, so I fail to grasp the legal significance of counsel's point. Jurisdictional discovery was ordered by you. It is now concluded, and you can always issue a supplemental Report and Recommendation so that the -- indeed, the whole purpose of the Federal Magistrates Act is to enforce and conserve judicial resources and to do things efficiently. So here we are. You had moved efficiently. You took the case, you ordered the discovery. We're applying for a motion, we can have our motion up in two or three weeks, whichever you decide, and then you can issue a supplemental Report and Recommendation if you choose.

17

THE COURT: Well, I want to hear the remainder of the plaintiffs' counsel's point.

19

MS. GIELCHINSKY: Are we --

20

THE COURT: (Indiscernible)

21

MS. GIELCHINSKY: Well, I would also -- I mean, besides procedurally, this affects his motion to dismiss, unless the Report and Recommendation is somehow withdrawn. It's just not the proper vehicle right now for the defendant to use until we have an order from the

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2 District Court.

3 I'd also just point out that the Report and
4 Recommendation didn't rely for personal jurisdiction
5 purposes in finding personal jurisdiction on any of the
6 transactions that are now, you know, proposed under
7 nesting theories. The Report and Recommendation found
8 that, you know, the properly - plaintiffs properly
9 alleged that the aid provided to Hamas came about via
10 money transfers through CAB's New York correspondent
11 accounts. The defendant made the argument already that
12 the 23 transfers initially alleged were decidedly not
13 the proximate cause of plaintiffs' injuries.

14 But that wasn't the standard; the Court said
15 that's not the standard. And, in any event, it doesn't
16 change -- the jurisdictional discovery under which now
17 we have 113 transfers totaling \$7.5 million dollars, as
18 opposed to 23 transfers totaling \$135,000, doesn't
19 change the jurisdictional analysis on the specific
20 customers; that's not what the personal jurisdiction
21 analysis is contingent on. This Court rightly conducted
22 an analysis comparing the number of transfers to *Licci's*
23 dozens of transfers and *Indosuez's* six transfers and
24 came up with its conclusion that plaintiff had made a
25 *prima facie* showing of personal jurisdiction. So the

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2 facts don't change it.

3 So it's not -- the 12(b)(2) motion, this is not
4 the right vehicle right now. What plaintiffs propose
5 the state of play would be is that the District Court
6 issue an order on the Report and Recommendation. If the
7 Court determines, if the District Court determines that
8 the plaintiffs have failed to state a claim under JASTA
9 or to satisfy personal jurisdiction elements, then we
10 might need to amend. And if not, the Court's actual
11 holding I think will make it much clearer what
12 defendant's motion should be, whether it is a motion to
13 reconsider or a Rule 56 motion or maybe -- maybe it
14 would be appropriate at that point for defendant to
15 submit a Rule 12(b)(2) motion. But, you know, at that
16 point defendant can submit a pre-motion letter outlining
17 what it's going to do.

18 MR. SIEGFRIED: If Your Honor wants me to
19 respond, I will, but I think --

20 THE COURT: I don't -- well, we're getting into
21 some of the merits. I don't see a reason procedurally
22 why this motion shouldn't be teed up. It can be teed up
23 either as -- it can be teed up as a Rule 12 and/or Rule
24 56 motion, frankly. And I'm not making any decisions on
25 the merits. Both sides are making reasoned arguments,

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2 and I'm going to have to consider them both carefully
3 after it's briefed. But procedurally, I don't see why
4 we can't set a schedule because these are
5 (indiscernible) that are briefed, anyway. Plaintiffs
6 have to add the transactions that you found during --
7 the additional transactions and provide that list. Can
8 you do that in a week from today?

9 MS. GIELCHINSKY: Yes, Your Honor.

10 THE COURT: Okay. So it --

11 MS. GIELCHINSKY: Your Honor --

12 THE COURT: If you provide --

13 MS. GIELCHINSKY: I'm so sorry to interrupt.

14 THE COURT: Yes, go ahead.

15 MS. GIELCHINSKY: I'm so sorry, Your Honor.

16 This is difficult on the phone. I'm just -- I'm here
17 with my colleague Gary Osen, and he was just hoping to
18 make a point to add.

19 THE COURT: Okay.

20 MR. GARY OSSEN: Yes, Your Honor. Gary Osen for
21 the plaintiff. Do I understand firstly that Your Honor
22 is issuing an order vacating the R & R?

23 THE COURT: No, absolutely not. I'm just
24 ordering briefing on post-jurisdictional discovery.
25 Judge Woods, I don't know when he's going to rule on the

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2 objections to the R & R. He may rule on it before this
3 is even fully briefed.

4 MR. OSEN: Well, then, Your Honor --

5 THE COURT: So this may be a completely moot
6 point.

7 MR. OSEN: So, but, Your Honor, here's the
8 question procedurally in terms of the schedule.
9 Ordinarily, again, because this is a strange procedural
10 animal, the defendant has not cited any case
11 (indiscernible) -- and Vasquez is not on point -- on
12 what happens in a case where jurisdiction has been found
13 sufficient, as the R & R indicates. And then there's
14 discovery subsequent to that where it's a 12(b)(2)
15 motion as opposed to a Rule 56. But the issue is even
16 more complex here, and this is why I wanted to interject
17 for a moment, because the nature of the claim, that is,
18 the transactional record here, is intrinsically tied up
19 with the merits. And the defendants' arguments and
20 their objections, for example, raise issues of proximate
21 cause, which of course is directly -- goes to the merits
22 of the case.

23 So, I don't know how in a circumstance like
24 this we would be able to respond to a brief that didn't
25 have an operative Complaint that incorporated not just

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2 the transactions that are reflected in the chart but
3 also reflect the corresponding allegations that tie the
4 transactions to unlawful conduct. So, it's just a
5 procedural question as to how they move under 12(b) (2)
6 against a Complaint that doesn't have not just all the
7 transactions but also the factual allegations that
8 connect those transactions to the arising-from element
9 of personal jurisdiction.

10

THE COURT: Well, look, that -- what you're
11 arguing there is that can't be decided because of its
12 inter -- one, you're saying it's Rule 56; that if it
13 is -- I mean, I think defendants would be wise to
14 characterize it as either/or -- but what I'm hearing is
15 plaintiffs are arguing that under Rule 56(f) you would
16 need more discovery because it's intertwined. I don't
17 know if that's the case or not; I'm not making a
18 decision on that in this call. What I'm saying -- and
19 I'm not aware of any reason why this motion can't be
20 teed up. So I'm going to start a briefing schedule.
21 And under --

22

MR. OSEN: But, Your Honor, again -- Your
23 Honor, the question isn't about the briefing schedule;
24 the question is about what Complaint they're moving
25 against.

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2 THE COURT: And you want to amend the Complaint
3 to add additional information for jurisdiction? I don't
4 know if that's required, given that you've had discovery
5 and you will be able to submit the additional
6 transactions by affidavit. I think both sides are going
7 to be in agreement about the transactions that you
8 found, what they are. And then you'll argue about the
9 significance of the nested transaction and so forth.

10 MR. OSEN: Your Honor, this is Gary Osen again.
11 I think there's a missing component here. And let me
12 give you a concrete example. There are multiple
13 entities in the transactional record that are
14 jurisdictionally relevant from the plaintiffs'
15 standpoint but for which there are no allegations in the
16 Complaint about them. And I don't mean the transactions
17 themselves; I mean who the counterparties to the
18 transactions are. So, for example, just to take one at
19 random, the Halhul (ph) Zakat Committee, which was on
20 the list of HLF unindicted co-conspirators. That's not
21 in the Complaint currently, the operative version, but
22 there are transactions to an account for Cairo Amman
23 Bank for that entity. There are no allegations in the
24 Complaint setting forth the relationship of the Halhul
25 Zakat Committee to Hamas. So, it's not simply a

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2 question of putting in an affidavit as to the
3 transactions; it's holistic. The Complaint and the
4 transactions can only be evaluated together because the
5 transactions themselves are the *actus reus*, if you will,
6 the act of material support or substantial assistance
7 that gives rise to the plaintiffs' claim.

8 MR. SIEGFRIED: Your Honor, if I might --

9 THE COURT: So you want to -- what you want to
10 do is amend the Complaint to shore up and add the
11 information that you found during jurisdictional
12 discovery; is that what you're saying?

13 MR. OSEN: In order -- yes, in order to -- of
14 course, we oppose any -- just so the record's clear, we
15 think it's an improper motion, but if Your Honor's going
16 to entertain it, then it should be against an operative
17 Complaint that contains both the transactional record,
18 which of course, will be reflected in the chart, but
19 also reflect --

20 THE COURT: I mean, the Complaint is already
21 like --

22 MR. OSEN: -- the allegation --

23 THE COURT: Mr. Osen, the Complaint's already
24 like 250 pages. It's really long. I mean, what --

25 MR. OSEN: Your Honor, that's a function --

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THE COURT: -- you're now going to add
3 additional entities? That's sort of changing the
4 target, isn't it?

5

MR. OSEN: It's what comes about as a result of
6 discovery. I mean --

7

MR. SIEGFRIED: Your Honor, may I -- I'm sorry.

8

MR. OSEN: Let me just conclude. Your Honor,
9 if defendant is going to be permitted, as we think it's
10 wholly improper procedurally, but if the defendant is
11 going to be permitted to proceed in this fashion, then
12 it must be against an operative Complaint that contains
13 the plaintiffs' allegations in full and which reflect
14 the discovery that has been yielded in this case.

15

THE COURT: Okay, I'm just not sure that's the
16 case because we have a notice pleading standard; and to
17 the extent there is additional facts that demonstrate,
18 in your view, that the defendant was engaging in serving
19 a customer to aid terrorism, I don't understand why all
20 of those transactions have to be in the Complaint.
21 That's not the way it normally works. Normally, there's
22 notice pleading and then there's discovery and then
23 additional facts are brought to bear without amending
24 the Complaint. So I'm not sure that I agree with you,
25 Mr. Osen, that it's necessary to be in the Complaint.

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2 I'd like to hear from defendants on that.

3 MR. OSEN: Your Honor, may I, Your Honor?

4 Apologies. One last point on that before you hear from
5 defendant?

6 To be clear, on a 12(b)(2) motion, the
7 allegations in the Complaint, even on a renewed 12(b)(2)
8 are deemed to be true for purposes of the motion, with
9 the exception of the jurisdictional component, which is
10 based on the facts produced or the evidence produced.
11 So the issue isn't whether we append or integrate 100-
12 plus transactions into the Complaint; it's the
13 allegations concerning the entities who are the
14 customers of the bank that are germane. And there are
15 only two ways that that can be accomplished, either by
16 amending the Complaint and treating those allegations as
17 true, or doing this at summary judgment after completion
18 of fact and expert discovery. And if the defendants
19 want to move under -- without full discovery, then it
20 has to be procedurally against an operative Complaint
21 that incorporates those allegations. Otherwise, we say
22 in our papers, well, look, there's a transaction for the
23 Halhul Zakat Committee, and the defendant says, "Who is
24 that? They're not the Complaint; that has no
25 jurisdictional relevance."

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MR. SIEGFRIED: Your Honor, would you like me
3 to comment at this point?

4

THE COURT: Yes. Go ahead.

5

MR. SIEGFRIED: Briefly, Mr. Osen needs to
6 refer to the law, (indiscernible). I do not know of any
7 case that supports a good bit of what he said, but he
8 will make those arguments in response to the motion, I
9 guess.

10

With respect to this whole idea of amending the
11 Complaint, Your Honor has it precisely correct. There
12 is nothing -- he has -- you have allowed three
13 amendments -- not you've allowed -- there was an initial
14 Complaint; you have permitted two amendments of the
15 Complaint already. So we have versions 1.0, 2.0 and
16 3.0. He now says I want to amend the Complaint again
17 based upon the jurisdictional discovery. That is what
18 the plaintiffs are contending. The jurisdictional
19 discovery that he refers to is the jurisdictional
20 discovery that he and the plaintiffs produced to us
21 specifically. Documents that were produced by Arab Bank
22 in *Linde* -- you're quite familiar with those, I know,
23 because you had the whole subpoena issue about that; and
24 of course, it was unsurprising that Arab Bank has now
25 come back and said we don't have any additional

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2 documents beyond those that we previously provided to
3 plaintiffs. They are the documents -- and those were
4 produced back in 2006 or something like that, '07. He
5 has documents from the HLF criminal trial which were in
6 his possession that he produced to us, that were
7 produced and therefore in his possession since, I
8 believe, around 2008. And he has documents from the
9 NatWest proceedings where Mr. Osen was the counsel and
10 where the documents produced in NatWest; and those -- I
11 don't know exactly when they were produced, but they
12 were certainly produced prior to 2016, I assume some
13 point between 2007 and 2016.

14 So for Mr. Osen -- and Mr. Osen drafted in
15 2019, so anywhere from six to 10 years after these
16 documents were in his possession -- he drafted the CAB
17 Complaint. And he now says, oh, I should be allowed to
18 now do a fourth amendment of the Complaint to allege
19 facts that I have in my possession that I could have
20 asserted previously and therefore let me first go and
21 amend my Complaint. This argument is also different
22 than what the plaintiff said in court to you two or
23 three months ago, where they referred to amending the
24 Complaint to add transactions they learned about after
25 filing the Amended Complaint. There were no

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2 transactions thus far that I'm aware of that they found
3 about after filing the Amended Complaint. All of the
4 transactions occurred before. If they have something
5 that they want to do under the 12(b) (2) motion -- and
6 perhaps we will restate it as an alternative, as you
7 suggest -- and a Rule 56 -- they have the ability to put
8 in factual evidence in support of an allegation. But
9 other than -- other than giving this -- the chart, the
10 jurisdictional allegations in this Complaint are in
11 paragraphs five through eight. We are obviously not
12 going to move on -- I assume he has changed his theory,
13 we'll see his chart, assuming this chart is the chart
14 we're moving under. Those are the allegations, he has
15 the facts, we will make our arguments. He will have an
16 opportunity to put in his factual support for the
17 allegations. It's a 12(b) (2) post-jurisdictional
18 motion. Again, I don't emphasize a distinction between
19 that and the legal standard under Rule 56 because the
20 Court says it's really the same. It is by definition a
21 motion outside of the pleadings. So as long as he has
22 factual evidence to support his assertion that the
23 transaction that the claims arise out of or relate to
24 the transaction, he is entitled to put that in. It's
25 not --

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THE COURT: Okay. I've --

3

MR. SIEGFRIED: -- he cannot -- and he can't prevail on an allegation, so there's no reason for --

5

THE COURT: Okay. Thank you.

6

MR. SIEGFRIED: -- for that.

7

THE COURT: I have heard enough from both sides. I am going to allow the motion. Plaintiffs should provide an updated chart by January 27th. Defendants should then file their motion by February 17. It should be a motion under Rule 12; or, in the alternative, under 56. And the plaintiffs should file their opposition -- let's see, I said the 17th -- opposition due March 10; reply due March 24.

15

And you can make whatever procedural -- to the extent plaintiffs want to make a procedural argument and you think it's 56 versus Rule 12, go right ahead; I'll take a look at that. And, you know, I'll evaluate everybody's arguments carefully once it's fully briefed.

20

MR. OSEN: This is Gary Osen, Your Honor. Two points, if I may? One on the schedule. I think, if I heard correctly, we get a week less time than the defendant for our --

24

THE COURT: No. I'm giving them three weeks after you give them the renewed charts.

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MR. OSEN: Right. And then we have until when?

3

THE COURT: So I was going to give you three weeks. Is that --

5

MR. OSEN: What was the date for our response?

6

THE COURT: So theirs was going to be due February 17, and I was going to have yours due March 10th.

9

MR. OSEN: Okay, that's fine, Your Honor.

10

THE COURT: And then reply due the 24th.

11

MR. OSEN: The other issue, Your Honor, is, is it possible if you can set forth in your minute order so that we have a record that you denied leave to amend?

14

THE COURT: Well, there has not been a formal motion to amend, so I have not ruled on such a motion. If you want to make a motion to amend, you have to prepare an Amended Complaint, you have to seek the defendant's permission to make that amendment. If they don't agree, then you have to make a motion. So I have not ruled on a motion to amend; I have not denied a motion to amend. That has not been briefed. I haven't seen an Amended Complaint, nor has defendant. So I'm not going to include that in the minute entry.

24

MR. OSEN: Okay, Your Honor, I understand. My question, then, is this: To the extent that the

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2 defendant is moving on February 17th, they'll be moving
3 against the operative Complaint plus the chart, as I
4 understand that; is that correct?

5 THE COURT: That's what I understand.

6 MR. OSEN: Okay. And so depending -- I mean,
7 one way, of course, that would clarify this further is
8 if the defendant actually filed a pre-motion letter that
9 set forth exactly what the basis of the motion is. Then
10 we could at least ascertain whether we're proceeding
11 under one theory or another and what the evidentiary
12 standard is.

13 THE COURT: I don't know that that is
14 necessary. I'm going to -- I'm waiving the requirement
15 of a pre-motion letter because we've been talking about
16 this for every single court conference since we've been
17 doing jurisdictional discovery. I don't think it's any
18 secret as to what the defendant's theory is.

19 MR. OSEN: I still don't understand what the
20 theory is, but perhaps Your Honor can enlighten us.

21 THE COURT: Well, I think the defendant is in
22 the best position to do that. But the basic thing that
23 they've described is that the allegations in the
24 Complaint are not true, that your theory of jurisdiction
25 has changed; and they're moving on that basis. That's

1 PROCEEDINGS 31
2 my understanding. I don't know if that's correct or
3 not. I'll take a look at the briefing. And I
4 understand you to be saying jurisdictional discovery has
5 only increased the jurisdictional basis to be here
6 because you've got more transactions. That is the
7 dispute, as I understand it.

8 MR. OSEN: Okay. I guess the question is,
9 then, just for us, because I don't want the Court to,
10 you know, be blindsided here, but obviously, depending
11 on what we receive on January 20 -- I'm sorry, on
12 February 17th from the defendant, we may very well move
13 to amend the Complaint or move to convert it to a Rule
14 56 motion, depending on what we see --

15 THE COURT: Sure, absolutely.

16 MR. OSEN: -- and that might affect the
17 schedule, of course.

18 THE COURT: Okay.

19 MR. OSEN: All right. Thank you.

20 THE COURT: That's within your right, if you
21 think that's appropriate.

22 Anything else?

23 MR. SIEGFRIED: Not from defendant. Thank you,
24 Your Honor.

25 THE COURT: Okay. Well, thanks, everybody.

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2 I'll look forward to reviewing your papers.

3 MR. SIEGFRIED: Your Honor, actually -- I'm
4 sorry, I just feel like -- are we still following your -
5 - are we --

6 THE COURT: My schedule? Yes.

7 MR. SIEGFRIED: No, no, no, the page limit, the
8 page limit to 25 pages.

9 THE COURT: Yes, definitely the page limit.

10 Yes.

11 MR. SIEGFRIED: Okay. Thank you, Your Honor.

12 THE COURT: Okay. Thank you. I'll issue a
13 Scheduling Order. Thank you. Bye-bye.

14 (Whereupon, the matter is adjourned.)

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C E R T I F I C A T E

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4

I, Carole Ludwig, certify that the foregoing
transcript of proceedings in the case of Averbach et al
v. Cairo Amman Bank, Docket #19-cv-00004-GHW-KHP, was
prepared using digital transcription software and is a
true and accurate record of the proceedings.

9

10

11

12

Signature _____

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Carole Ludwig

14

Date: January 23, 2023

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Exhibit B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re: :
AVERBACH, et al., : Docket # 1:19-cv-00004-
: GHW-KHP

Plaintiffs, :
- against - :
CAIRO AMMAN BANK, : New York, New York
: January 19, 2023

Defendant. :
----- : TELEPHONIC CASE
----- : MANAGEMENT CONFERENCE

PROCEEDINGS BEFORE
THE HONORABLE KATHARINE H. PARKER,
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

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None

E X H I B I T S

<u>Exhibit Number</u>	<u>Description</u>	<u>ID</u>	<u>In</u>	<u>Voir Dire</u>
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None

1 PROCEEDINGS 3
2 THE CLERK: Calling 19-cv-004, Averbach vs.
3 Cairo Amman Bank; the Honorable Katharine H. Parker,
4 presiding.

5 Beginning with counsel for the plaintiff,
6 please make your appearance for the record.

7 MS. DINA GIELCHINSKY: Good morning, ~~your~~
8 ~~Honor~~Your Honor. This is Dina Gielchinsky from Osen LLC
9 on behalf of the plaintiffs. I'm joined by my
10 colleagues, Gary Osen and Michael Radine.

11 THE CLERK: And, counsel for the defendant,
12 please make your appearance for the record.

13 MR. JONATHAN D. SIEGFRIED: Good morning, ~~your~~
14 ~~Honor~~Your Honor; Jonathan Siegfried appearing for CAB.
15 I'm joined by Andrew Peck, Erin Collins and Margaret
16 Civetta.

17 HONORABLE KATHARINE H. PARKER (THE COURT):
18 Good morning. Thank you for your flexibility in
19 switching to phone today. Because we are on the phone,
20 I ask that you keep your phones on mute unless you're
21 speaking and state your name before speaking. Also, I
22 remind you that the Court's conference line is open to
23 the press and public on a listen-only basis and that
24 court rules prohibit others from recording and
25 rebroadcasting court proceedings.

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2 So I think there's not too much to report based
3 on your recent letter to the Court, but I did want to
4 get an update on the jurisdictional discovery and also
5 talk about the anticipated motion that defendants want
6 to make.

7 So where are you on the discovery?

8 MS. GIELCHINSKY: Your Honor, I can start --
9 Dina Gielchinsky for the plaintiffs. We received -- as
10 we stated in our last status report, we received ~~the~~
11 Arab Bank's response to our subpoena advising us that
12 they were not able to locate responsive documents. That
13 was basically it under jurisdictional discovery.

14 With respect to ~~your Honor~~Your Honor's second
15 point, we held a meet-and-confer with the defendant on
16 January 13th, and we just restated our position that
17 jurisdictional briefing should wait until the District
18 Court issues its order on the R & R. And that remains
19 our position.

20 THE COURT: Okay. Let me hear what the defense
21 position is on the motion to dismiss. Why should it be
22 filed now, as opposed to waiting for a decision on the
23 R & R?

24 MR. SIEGFRIED: Certainly, ~~your Honor~~Your
25 Honor. Thanks very much. This is Jonathan Siegfried

1 PROCEEDINGS 5
2 speaking. Your Honor, last June at our first conference
3 we raised questions as to whether plaintiffs could
4 actually support the jurisdictional allegations in their
5 Second Amended Complaint. Recognizing that ~~ate~~
6 jurisdiction is a threshold issue.~~.-~~ You directed the
7 parties to engage in jurisdictional discovery and have
8 overseen that discovery for the last seven months. As
9 plaintiffs acknowledge that discovery is now completed
10 and we are prepared to proceed on our motion, which
11 brings us to the issue that plaintiffs now raise, which
12 is that the Court should wait for the District Court to
13 rule on the Report and Recommendation. Simply put, ~~your~~
14 ~~Honor~~Your Honor, plaintiffs are wrong on the law about
15 that, and they're asking the District Court to either
16 ignore or rule on the issue of specific jurisdiction
17 without regard to the facts.

18 Let me start with the law, because their legal
19 position is based on a fundamental misapprehension of
20 where we are. A renewed motion to dismiss under
21 12(b) (2), ~~your Honor~~Your Honor, following jurisdictional
22 discovery is not simply addressed to the pleadings and
23 involves an entirely different legal standard than the
24 pre-discovery legal standard the Court applied in the R
25 & R. Prior to jurisdictional discovery, ~~your Honor~~Your

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2 Honor, under well-established Second Circuit precedent,
3 a plaintiff's showing of jurisdiction may be established
4 solely by allegations in the pleading, which are deemed
5 to be true by the Court. It's quite clear, from what
6 you precisely state in the R & R.

7 THE COURT: Right.

8 MR. SIEGFRIED: It's the standard you applied.
9 You found that plaintiffs had made a *prima facie* showing
10 of personal jurisdiction based on the allegations in the
11 Complaint, which are deemed to be true, and from which
12 you drew all favorable inferences to plaintiffs. That
13 is not the legal standard following jurisdictional
14 discovery. The Second Circuit and numerous Courts in
15 this district have made clear that, following
16 jurisdictional discovery, a plaintiff's showing must be
17 factually supported. I think perhaps ~~just as~~ Judge
18 Engelmayr put it most succinctly in a couple of cases
19 (indiscernible) -- I'd refer you perhaps to Pizzeria vs.
20 *GE UK Holdings*, quote, "After jurisdictional discovery,
21 admissible evidence, not a party's pleading or say-so,
22 controls." So we begin with the fact that, given the
23 procedural posture of the case, we are dealing with an
24 entirely different legal standard than the legal
25 standard you applied, which frankly at the moment, Judge

1 PROCEEDINGS

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2 Woods has before him.

3 That brings -- as I said, they're wrong on the
4 law and I said they're wrong on the facts -- and that
5 brings us to the facts. The evidentiary record that has
6 been established in discovery, as we will show ~~in a~~ our
7 motion, shows or provides ~~as~~ evidence that directly
8 contradicts the allegations of the pleading, and in
9 other cases does not support it. And ~~Y~~our Honor is
10 very aware of one example in particular because it's
11 been the subject of several conferences. The Complaint
12 alleges that there were 21 transfers to four individuals
13 through CAB's correspondent account at Citibank,
14 including six transfers to one individual who was
15 alleged to have planned one of the attacks. The
16 jurisdictional discovery showed those allegations, which
17 ~~your Honor~~ Your Honor expressly referred to in the R & R
18 and deemed to be true, as you ~~were~~
19 required ~~indiscernible~~) to, in fact could not be
20 factually supported and were indeed untrue. And you
21 ~~have~~ had seen as a result that plaintiffs then changed
22 their entire argument about those transfers and came up
23 with what they call the nesting theory.

24 And of course that nesting -- they're putting
25 this -- it was not before you when you did the R & R,

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2 it's not before Judge Woods. And we also know that the
3 nesting theory has been rejected, at least by one Court
4 in this district. And we further know, from the
5 jurisdictional discovery, that it wouldn't even apply in
6 this case even were the Second Circuit to uphold it.

7 So I know we're not going to get -- I don't
8 want to go too deep into the merits here, but basically
9 -- basically, Your Honor, what that argument means ~~and~~
10 ~~what~~ is that plaintiffs would have Your Honor stand
11 aside, ignore what is now the evidentiary record and
12 allow the District Court perhaps to adopt findings and
13 conclusions in the R & R which you now know to be
14 incorrect, such as the allegations regarding those
15 transfers. And it would have the District Court rule on
16 a motion based on a pre-discovery legal standard that is
17 no longer relevant to the procedural posture of the case
18 now and to do so without the evidentiary record that now
19 exists and which is relevant to properly deciding
20 whether personal jurisdiction exists.

21 The idea, Your Honor, that's behind
22 plaintiffs' argument, that Your Honor should stand
23 aside under these circumstances therefore is not only
24 wrong on the law but would result in a total waste of
25 the District Court's time and resources in ruling on

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2 that portion of the R & R, where as I said, both the
3 legal standard is no longer the applicable legal
4 standard under Second Circuit precedent and where the
5 facts are different. And plaintiffs even acknowledge~~s~~,
6 at least with respect to a number of the nesting
7 transactions, that the facts are different because they
8 no longer claim that those transactions even went
9 through Citibank.

10 Now, I say we're not -- unless you want me to,
11 I'm not going further into the merits regarding all of
12 the other transactions, but the same types of issues
13 arise when you apply the facts that we now have through
14 jurisdictional discovery to the ~~M~~minimum ~~E~~Contacts
15 ~~A~~analysis and the ~~F~~Full ~~M~~minimum ~~E~~Contacts ~~a~~Analysis
16 that is to be applied under the due process clause but,
17 again, not on the basis of the allegations, the
18 jurisdictional allegations in the Complaint, which are
19 at paragraphs five through eight, but on the evidentiary
20 record that has been developed through the
21 jurisdictional discovery that you ordered and supervised
22 and brings us to today.

23 So our argument and our position is that we
24 should proceed with the motion under the proper
25 standard, under the full evidentiary record, and~~but~~ that

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2 Your Honor should rule on that, decide that, and then
3 what Judge Woods would have before him is a ruling on
4 jurisdiction that is made under both the proper legal
5 standard and upon full evidentiary record rather than
6 ignoring all of that and ruling on something, as I said,
7 that the Second Circuit says is no longer procedurally
8 relevant.

9 One last point, if I might, your Honor
10 Your Honor.[?] And that is -- I might also refer Your Honor
11 to Judge Engelmayer's decision in *Vasquez vs. HSBC* --
12 it's at 477 F.Supp. 3d 241. There, as here, your
13 HonorYour Honor, the Court denied an initial 12(b)(2)
14 motion to dismiss direct to the pleadings. There, as
15 here, the Court ordered jurisdictional discovery.
16 There, as here, jurisdictional discovery was completed.
17 And there, as here, upon completion of jurisdictional
18 discovery, Judge Engelmayer heard a renewed motion to
19 dismiss under 12(b)(2), specifically distinguished
20 between the pre- and post-discovery standards and what
21 he was to look at, and then granted the jurisdictional
22 motion to dismiss that he had previously denied,
23 applying the proper standard applicable to the motion
24 that was made at the time. That is what we are
25 suggesting that we do so that we can engage in an

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2 efficient process for resolving the threshold

3 jurisdictional issue(indiscernible).

4 THE COURT: Okay. So if there's no
5 jurisdiction, that moots the remainder of the objection
6 on the R & R or any decision on that remainder of the R
7 & R, as well.

8 MR. SIEGFRIED: Absolutely, which is another
9 reason for having it, that threshold issue, correctly
10 decided. It doesn't mean that -- I may have disagreed
11 and filed objections to your prior conclusion, but it
12 doesn't mean that you didn't apply the proper standards
13 to the pleadings as alleged and issuedd your reasoned
14 opinion. But what it does mean that we are -- you
15 obviously had the authority to order the jurisdictional
16 discovery. We are at that point in time, and so you
17 should have the opportunity to make that decision. If
18 you rule that way, if you rule in our favor this time,
19 then that is the issue that will go before Judge Woods;
20 and if you ruled in our favor, the defendant's favor, he
21 ~~it~~ would not reach the 12(b)(6) issues. If you ruled
22 against us and he affirmed your ruling, then of course,
23 he would have to reach it. But he certainly wouldn't go
24 on right now -- not only is he (indiscernible) but would
25 be deciding on the wrong legal -- on the not

1 PROCEEDINGS 12

2 procedurally relevant legal standard and ignoring the
3 evidence with regard to jurisdiction, but he might also
4 then go on to just rule on the 12(b)(6) motion part that
5 he wouldn't even need to or properly reach. It cannot
6 be that that is anything other than a waste of judicial
7 resources.

8 THE COURT: Right. Okay, so I agree that the
9 briefing should commence. When will defendants be in a
10 position to file a moving brief?

11 MR. SIEGFRIED: Your Honor, you may recall that
12 the plaintiffs gave us a chart, and they gave that same
13 chart to ~~your Honor~~Your Honor, listing all of their
14 transactions. I don't believe that any of the discovery
15 that occurred subsequent to that chart resulted or would
16 have resulted in any additions to that chart. If that
17 is the chart, then we would be prepared to move forward
18 with our moving brief on, say, if you gave us a few
19 weeks to --

20 THE COURT: -(Indiscernible)

21 MR. SIEGFRIED: I'm sorry?

22 THE COURT: Could you do it by January 31?

23 MR. SIEGFRIED: We could, ~~your Honor~~Your Honor.
24 I think that's a -- what is that, two weeks, I think,
25 from where we are today. I think I'd prefer three

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2 weeks, just because we have a foreign client and
3 therefore, obviously, we would want to be able to draft
4 and be able to have them see what we're doing. So I'd
5 prefer three weeks; but if you wanted -- you know,
6 required us to do it by the 31st, we would do it.

7 THE COURT: Are there any changes to the chart
8 that plaintiffs wanted to make?

9 MS. GIELCHINSKY: Yes, your Honor Your Honor.

10 We can send an updated chart.

11 And if I could just be heard also on
12 Mr. Siegfried's points? Because he brought up Vasquez,
13 which has a significant distinction from the procedural
14 posture here in that Judge Engelmayr denied the motion
15 to dismiss without prejudice and authorized
16 jurisdictional discovery. So a renewed 12(b)(2) motion
17 in that case procedurally is the way to go. Here, the
18 Report and Recommendation recommended denial but without
19 jurisdictional discovery. Jurisdictional discovery was
20 eventually ordered, but we have a Report and
21 Recommendation denying the defendant's motion to dismiss
22 on personal jurisdiction grounds. So this would be a
23 successive motion to dismiss. What I'm hearing and what
24 I think would have to happen now is that the defendant
25 would need to move to vacate the Report and

1 PROCEEDINGS 14
2 Recommendation that's outstanding or somehow it would
3 need to be withdrawn for this to be procedurally
4 appropriate.

5 THE COURT: Well, they could also move for
6 summary judgment, couldn't they?

7 MS. GIELCHINSKY: They could move for summary
8 judgment, yes; yes, they could --

9 THE COURT: Under Rule 56.

10 MS. GIELCHINSKY: Yes.

11 MR. SIEGFRIED: Your Honor, two points. First
12 of all, the 12(b)(2) motion post jurisdictional
13 discovery applies under, again, Second Circuit
14 precedent; and, again, Judge Engelmayer has this in his
15 decision, as do other courts. It applies the Rule 56
16 legal standards in terms of that the motion must be --
17 the plaintiffs are required to actually support the
18 allegations, affidavits are supposed to be -- are to be
19 on the basis of personal knowledge, documents have to be
20 authenticated. So the legal standard, the Rule 56 legal
21 standards is to admissibility of evidence and the like,
22 are all applicable. It doesn't have to be Rule 56
23 motions. Number two, the --

24 THE COURT: But in this case, if the Court
25 doesn't have subject matter jurisdiction, that can be

1 PROCEEDINGS 15

2 raised at any time.

3 MR. SIEGFRIED: Yes. I'm just simply saying
4 the point that ~~your Honor~~Your Honor -- I didn't see that
5 ~~your Honor~~Your Honor issued the Report and
6 Recommendation with prejudice, either.

7 THE COURT: No. No, no.

8 MR. SIEGFRIED: Your Honor obviously ordered
9 jurisdictional discovery, so I fail to grasp the legal
10 significance of counsel's point. Jurisdictional
11 discovery was ordered by you. It is now concluded, and
12 you can always issue a supplemental Report and
13 Recommendation so that the -- indeed, the whole purpose
14 of the Federal Magistrates Act is to enforce and
15 conserve judicial resources and to do things
16 efficiently. So here we are. You had moved
17 efficiently. You took the case, you ordered the
18 discovery. We're applying for a motion, we can have our
19 motion up in two or three weeks, whichever you decide,
20 and then you can issue a supplemental Report and
21 Recommendation if you choose.

22 THE COURT: Well, I want to hear the remainder
23 of the plaintiffs' counsel's point.

24 MS. GIELCHINSKY: Are we --

25 THE COURT: -(Indiscernible)

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MS. GIELCHINSKY: Well, I would also -- I mean, besides procedurally, this affects his motion to dismiss, unless the Report and Recommendation is somehow withdrawn. It's just not the proper vehicle right now for the defendant to use until we have an order from the District Court.

8

I'd also just point out that the Report and Recommendation didn't rely for personal jurisdiction purposes in finding personal jurisdiction on any of the transactions that are now, you know, proposed under ~~(indiscernible)~~ nesting theories. The Report and Recommendation found that, you know, the properly ~~--~~ plaintiffs ~~(indiscernible)~~ properly alleged that the aid provided to Hamas came about via money transfers through CAB's New York correspondent accounts. The defendant made the argument already that the 23 transfers initially alleged were decidedly not the proximate cause of plaintiffs' injuries.

20

But that wasn't the standard; the Court said that's not the standard. And, in any event, it doesn't change -- the jurisdictional discovery under which now we have 113 transfers totaling \$7.5 million dollars, as opposed to 23 transfers totaling \$135,000, doesn't change the jurisdictional analysis on the specific

1 PROCEEDINGS 17
2 customers; that's not what the personal jurisdiction
3 analysis is contingent on. This Court rightly conducted
4 an analysis comparing the number of transfers to *Licci's*
5 dozens of transfers and Indosuez's six (~~indiscernible~~)
6 transfers and came up with its conclusion that plaintiff
7 had made a prima facie showing of personal jurisdiction.
8 So the facts don't change it.

9 So it's not -- the 12(b)(2) motion, this is not
10 the right vehicle right now. What plaintiffs propose
11 the state of play would be is that the District Court
12 issue an order on the Report and Recommendation. If the
13 Court determines, if the District Court determines that
14 the plaintiffs have failed to state a claim under
15 JASTA~~Jasko~~ or to satisfy personal jurisdiction elements,
16 then we might need to amend. And if not, the Court's
17 actual holding I think will make it much clearer what
18 defendant's motion should be, whether it is a motion to
19 reconsider or a Rule 56 motion or maybe -- maybe it
20 would be appropriate at that point for defendant to
21 submit a Rule 12(b)(2) motion. But, you know, at that
22 point defendant can submit a pre-motion letter outlining
23 what it's going to do.

24 MR. SIEGFRIED: If ~~your Honor~~Your Honor wants
25 me to respond, I will, but I think --

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2 THE COURT: I don't -- well, we're getting into
3 some of the merits. I don't see a reason procedurally
4 why this motion shouldn't be teed up. It can be teed up
5 either as -- it can be teed up as a Rule 12 and/or Rule
6 56 motion, frankly. And I'm not making any decisions on
7 the merits. Both sides are making reasoned arguments,
8 and I'm going to have to consider them both carefully
9 after it's briefed. But procedurally, I don't see why
10 we can't set a schedule because these are
11 (indiscernible) that are briefed, anyway. Plaintiffs
12 have to add the transactions that you found during --
13 the additional transactions and provide that list. Can
14 you do that in a week from today?

15

MS. GIELCHINSKY: Yes, ~~your Honor~~Your Honor.

16

THE COURT: Okay. So it --

17

MS. GIELCHINSKY: Your Honor --

18

THE COURT: If you provide --

19

MS. GIELCHINSKY: I'm so sorry to interrupt.

20

THE COURT: Yes, go ahead.

21

MS. GIELCHINSKY: I'm so sorry, ~~your Honor~~Your
Honor. This is difficult on the phone. I'm just -- I'm
here with my colleague Gary Osen, and he was just hoping
to make a point to add.

25

THE COURT: Okay.

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MR. GARY OSEN: Yes, ~~your Honor~~Your Honor.

3

Gary Osen for the plaintiff. Do I understand firstly
4 that ~~your Honor~~Your Honor is issuing an order vacating
5 the R & R?

6

THE COURT: No, absolutely not. I'm just
7 ordering briefing on post-jurisdictional discovery.

8

Judge Woods, I don't know when he's going to rule on the
9 objections to the R & R. He may rule on it before this
10 is even fully briefed.

11

MR. OSEN: Well, then, ~~your Honor~~Your Honor --

12

THE COURT: So this may be a completely moot
13 point.

14

MR. OSEN: So, but, ~~your Honor~~Your Honor,
15 here's the question procedurally in terms of the
16 schedule. Ordinarily, again, because this is a strange
17 procedural animal, the defendant has not cited any case
18 (indiscernible) -- and Vasquez is not on point -- on
19 what happens in a case where jurisdiction has been found
20 sufficient, as the R & R indicates. And then there's
21 discovery subsequent to that where it's a 12(b) (2)
22 motion as opposed to a Rule 56. But the issue is even
23 more complex here, and this is why I wanted to interject
24 for a moment, because the nature of the claim, that is,
25 the transactional record here, is intrinsically tied up

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2 with the merits. And the defendants' arguments and
3 their objections, for example, raise issues of proximate
4 cause, which of course is directly -- goes to the merits
5 of the case.

6 So, I don't know how in a circumstance like
7 this we would be able to respond to a brief that didn't
8 have an operative Complaint that incorporated not just
9 the transactions that are reflected in the chart but
10 also reflect the corresponding allegations that tie the
11 transactions to unlawful conduct. So, it's just a
12 procedural question as to how they move under 12(b) (2)
13 against a Complaint that doesn't have not just all the
14 transactions but also the factual allegations that
15 connect those transactions to the arising-from element
16 of personal jurisdiction.

17 THE COURT: Well, look, that -- what you're
18 arguing there is that can't be decided because of its
19 inter -- one, you're saying it's Rule 56; that if it
20 is -- I mean, I think defendants would be wise to
21 characterize it as either/or -- but what I'm hearing is
22 plaintiffs are arguing that under Rule 56(f) you would
23 need more discovery because it's intertwined. I don't
24 know if that's the case or not; I'm not making a
25 decision on that in this call. What I'm saying -- and

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2 I'm not aware of any reason why this motion can't be
3 teed up. So I'm going to start a briefing schedule.

4 And under --

5 MR. OSEN: But, ~~your Honor~~Your Honor, again --
6 ~~your Honor~~Your Honor, the question isn't about the
7 briefing schedule; the question is about what Complaint
8 they're moving against.

9 THE COURT: And you want to amend the Complaint
10 to add additional information for jurisdiction? I don't
11 know if that's required, given that you've had discovery
12 and you will be able to submit the additional
13 transactions by affidavit. I think both sides are going
14 to be in agreement about the transactions that you
15 found, what they are. And then you'll argue about the
16 significance of the nested transaction and so forth.

17 MR. OSEN: Your Honor, this is Gary Osen again.
18 I think there's a missing component here. And let me
19 give you a concrete example. There are multiple
20 entities in the transactional record that are
21 jurisdictionally relevant from the plaintiffs'
22 standpoint but for which there are no allegations in the
23 Complaint about them. And I don't mean the transactions
24 themselves; I mean who the counterparties to the
25 transactions are. So, for example, just to take one at

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2 random, the Halhul (ph) Zakat Committee, which was on
3 the list of HLOF unindicted co-conspirators. That's not
4 in the Complaint currently, the operative version, but
5 there are transactions to an account for Cairo Amman
6 Bank for that entity. There are no allegations in the
7 Complaint setting forth the relationship of the Halhul
8 Zakat Committee to Hamas. So So, it's not simply a
9 question of putting in an affidavit as to the
10 transactions; it's holistic. The Complaint and the
11 transactions can only be evaluated together because the
12 transactions themselves are the *actus reus*, if you will,
13 the act of material support or substantial assistance
14 that gives rise to the plaintiffs' claim.

15 MR. SIEGFRIED: Your Honor, if I might --

16 THE COURT: So you want to -- what you want to
17 do is amend the Complaint to shore up and add the
18 information that you found during jurisdictional
19 discovery; is that what you're saying?

20 MR. OSEN: In order -- yes, in order to -- of
21 course, we oppose any -- just so the record's clear, we
22 think it's an improper motion, but if your Honor
23 Your Honor's going to entertain it, then it should be against
24 an operative Complaint that contains both the
25 transactional record, which of course, will be reflected

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2 in the chart, but also reflect --

3 THE COURT: I mean, the Complaint is already
4 like --

5 MR. OSEN: -- the allegation --

6 THE COURT: Mr. Osen, the Complaint's already
7 like 250 pages. It's really long. I mean, what --

8 MR. OSEN: Your Honor, that's a function --

9 THE COURT: -- you're now going to add
10 additional entities? That's sort of changing the
11 target, isn't it?

12 MR. OSEN: It's what comes about as a result of
13 discovery. I mean --

14 MR. SIEGFRIED: Your Honor, may I -- I'm sorry.

15 MR. OSEN: Let me just conclude. Your Honor,
16 if defendant is going to be permitted, as we think it's
17 wholly improper procedurally, but if the defendant is
18 going to be permitted to proceed in this fashion, then
19 it must be against an operative Complaint that contains
20 the plaintiffs' allegations in full and which reflect
21 the discovery that has been yielded in this case.

22 THE COURT: Okay, I'm just not sure that's the
23 case because we have a notice pleading standard; and to
24 the extent there is additional facts that demonstrate,
25 in your view, that the defendant was engaging in serving

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2 a customer to aid terrorism, I don't understand why all
3 of those transactions have to be in the Complaint.
4 That's not the way it normally works. Normally, there's
5 notice pleading and then there's discovery and then
6 additional facts are brought to bear without amending
7 the Complaint. So I'm not sure that I agree with you,
8 Mr. Osen, that it's necessary to be in the Complaint.
9 I'd like to hear from defendants on that.

10

MR. OSEN: Your Honor, may I, ~~your Honor~~ Your
11 Honor? Apologies. One last point on that before you
12 hear from defendant?

13

To be clear, on a 12(b)(2) motion, the
14 allegations in the Complaint, even on a renewed 12(b)(2)
15 are deemed to be true for purposes of the motion, with
16 the exception of the jurisdictional component, which is
17 based on the facts produced or the evidence produced.
18 So the issue isn't whether we append or integrate 100-
19 plus transactions into the Complaint; it's the
20 allegations concerning the entities who are the
21 customers of the bank that are germane. And there are
22 only two ways that that can be accomplished, either by
23 amending the Complaint and treating those allegations as
24 true, or doing this at summary judgment after completion
25 of fact and expert discovery. And if the defendants

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2 want to move under -- without full discovery, then it
3 has to be procedurally against an operative Complaint
4 that incorporates those allegations. Otherwise, we say
5 in our papers, well, look, there's a transaction for the
6 Halhul Zakat Committee, and the defendant says, "Who is
7 that? They're not the Complaint; that has no
8 jurisdictional relevance."

9 MR. SIEGFRIED: Your Honor, would you like me
10 to comment at this point?

11 THE COURT: Yes. Go ahead.

12 MR. SIEGFRIED: Briefly, Mr. Osen needs to
13 refer to the law, (indiscernible). I do not know of any
14 case that supports~~puts~~ a good bit of what he said, but
15 he will make those arguments in response to the motion,
16 I guess.

17 With respect to this whole idea of amending the
18 Complaint, ~~your Honor~~Your Honor has it precisely
19 correct. There is nothing -- he has -- you have allowed
20 three amendments -- not you've allowed -- there was an
21 initial Complaint; you have permitted two amendments of
22 the Complaint already. So we have versions 1.0, 2.0 and
23 3.0. He now says I want to amend the Complaint again
24 based upon the jurisdictional discovery. That is what
25 the plaintiffs are contending. The jurisdictional

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2 discovery that he refers to is the jurisdictional
3 discovery that he and the plaintiffs produced to us
4 specifically. Documents that were produced by Arab Bank
5 in *Linde* -- you're quite familiar with those, I know,
6 because you had the whole subpoena issue about that; and
7 of course, it was unsurprising that Arab Bank has now
8 come back and said we don't have any additional
9 documents beyond those that we previously provided to
10 plaintiffs. They are the documents -- and those were
11 produced back in 2006 or something like that, '07. He
12 has documents from the HLF criminal trial which were in
13 his possession that he produced to us, that were
14 produced and therefore in his possession since, I
15 believe, around 2008. And he has documents from the
16 NatWest proceedings where Mr. Osen was the counsel and
17 where the documents produced in NatWest; and those -- I
18 don't know exactly when they were produced, but they
19 were certainly produced prior to 2016, I assume some
20 point between 2007 and 2016.

21 So for Mr. Osen -- and Mr. Osen drafted in
22 2019, so anywhere from six to 10 years after these
23 documents were in his possession -- he drafted the ~~DAD~~
24 CAB Complaint. And he now says, oh, I should be allowed
25 to now do a fourth amendment of the Complaint to allege

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2 facts that I have in my possession that I could have
3 asserted previously and therefore let me first go and
4 amend my Complaint. This argument is also different
5 than what the plaintiff said in court to you two or
6 three months ago, where they referred to amending the
7 Complaint to add transactions they learned about after
8 filing the Amended Complaint. There were no
9 transactions thus far that I'm aware of that they found
10 about after filing the Amended Complaint. All of the
11 transactions occurred before. If they have something
12 that they want to do under the 12(b)(2) motion -- and
13 perhaps we will restate it as an alternative, as you
14 suggest -- and a Rule 56 -- they have the ability to put
15 in factual evidence in support of an allegation. But
16 other than -- other than giving this -- the chart, the
17 jurisdictional allegations in this Complaint are in
18 paragraphs five through eight. We are obviously not
19 going to move on -- I assume he has changed his theory,
20 we'll see his chart, assuming this chart is the chart
21 we're moving under. Those are the allegations, he has
22 the facts, we will make our arguments. He will have an
23 opportunity to put in his factual support for the
24 allegations. It's a 12(b)(2) post-jurisdictional
25 motion. Again, I don't emphasize a distinction between

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2 that and the legal standard under Rule 56 because the
3 Court says it's really the same. It is by definition a
4 motion outside of the pleadings. So as long as he has
5 factual evidence to support his assertion that the
6 transaction that the claims arise out of or relate to
7 the transaction, he is entitled to put that in. It's
8 not --

9 THE COURT: Okay. I've --

10 MR. SIEGFRIED: -- he cannot -- and he can't
11 prevail on an allegation, so there's no reason for --

12 THE COURT: Okay. Thank you.

13 MR. SIEGFRIED: -- for that.

14 THE COURT: I have heard enough from both
15 sides. I am going to allow the motion. Plaintiffs
16 should provide an updated chart by January 27th.
17 Defendants should then file their motion by February 17.
18 It should be a motion under Rule 12; or, in the
19 alternative, under 56. And the plaintiffs should file
20 their opposition -- let's see, I said the 17th --
21 opposition due March 10; reply due March 24.

22 And you can make whatever procedural -- to the
23 extent plaintiffs want to make a procedural argument and
24 you think it's 56 versus Rule 12, go right ahead; I'll
25 take a look at that. And, you know, I'll evaluate

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2 everybody's arguments carefully once it's fully briefed.

3 MR. OSEN: This is Gary Osen, ~~your Honor~~Your

4 Honor. Two points, if I may? One on the schedule. I

5 think, if I heard correctly, we get a week less time

6 than the defendants for our --

7 THE COURT: No. I'm giving them three weeks

8 after you give them the renewed charts.

9 MR. OSEN: Right. And then we have until when?

10 THE COURT: So I was going to give you three
11 weeks. Is that --

12 MR. OSEN: What was the date for our response?

13 THE COURT: So theirs was going to be due
14 February 17, and I was going to have yours due
15 March 10th.

16 MR. OSEN: Okay, that's fine, ~~your Honor~~Your
17 Honor.

18 THE COURT: And then reply due the 24th.

19 MR. OSEN: The other issue, ~~your Honor~~Your
20 Honor, is, is it possible if you can set forth in your
21 minute order so that we have a record that you denied
22 leave to amend?

23 THE COURT: Well, there has not been a formal
24 motion to amend, so I have not ruled on such a motion.
25 If you want to make a motion to amend, you have to

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2 prepare an Amended Complaint, you have to seek the
3 defendant's permission to make that amendment. If they
4 don't agree, then you have to make a motion. So I have
5 not ruled on a motion to amend; I have not denied a
6 motion to amend. That has not been briefed. I haven't
7 seen an Amended Complaint, nor has ~~the~~ defendant. So I'm
8 not going to include that in the minute entry.

9

MR. OSEN: Okay, ~~Your Honor~~Your Honor, I
10 understand. My question, then, is this: To the extent
11 that the defendant is moving on February 17th, they'll
12 be moving against the operative Complaint plus the
13 chart, as I understand that; is that correct?

14

THE COURT: That's what I understand.

15

MR. OSEN: Okay. And so depending -- I mean,
16 one way, of course, that would clarify this further is
17 if the defendant actually filed a pre-motion letter that
18 set forth exactly what the basis of the motion is. Then
19 we could at least ascertain whether we're proceeding
20 under one theory or another and what the evidentiary
21 standard is.

22

THE COURT: I don't know that that is
23 necessary. I'm going to -- I'm waiving the requirement
24 of a pre-motion letter because we've been talking about
25 this for every single court conference since we've been

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2 doing jurisdictional discovery. I don't think it's any
3 secret as to what the defendant's theory is.

4 MR. OSEN: I still don't understand what the
5 theory is, but perhaps ~~your Honor~~ Your Honor can
6 enlighten us.

7 THE COURT: Well, I think the defendant's ~~is~~ are
8 in the best position to do that. But the basic thing
9 that they've described is that the allegations in the
10 Complaint are not true, that your theory of jurisdiction
11 has changed; and they're moving on that basis. That's
12 my understanding. I don't know if that's correct or
13 not. I'll take a look at the briefing. And I
14 understand you to be saying jurisdictional discovery has
15 only increased the jurisdictional basis to be here
16 because you've got more transactions. That is the
17 dispute, as I understand it.

18 MR. OSEN: Okay. I guess the question is,
19 then, just for us, because I don't want the Court to,
20 you know, be blindsided here, but obviously, depending
21 on what we receive on January 20 -- I'm sorry, on
22 February 17th from the defendant, we may very well move
23 to amend the Complaint or move to convert it to a Rule
24 56 motion, depending on what we see --

25 THE COURT: Sure, absolutely.

1 PROCEEDINGS 32

2 MR. OSEN: -- and that might affect the
3 schedule, of course.

4 THE COURT: Okay.

5 MR. OSEN: All right. Thank you.

6 THE COURT: That's within your right, if you
7 think that's appropriate.

8 Anything else?

9 MR. SIEGFRIED: Not from defendant. Thank you,
10 ~~your Honor~~Your Honor.

11 THE COURT: Okay. Well, thanks, everybody.
12 I'll look forward to reviewing your papers.

13 MR. SIEGFRIED: Your Honor, actually -- I'm
14 sorry, I just feel like -- are we still following your -
15 - are we --

16 THE COURT: My schedule? Yes.

17 MR. SIEGFRIED: No, no, no, the page limit, the
18 page limit to 25 pages.

19 THE COURT: Yes, definitely the page limit.
20 Yes.

21 MR. SIEGFRIED: Okay. Thank you, ~~your~~
22 ~~Honor~~Your Honor.

23 THE COURT: Okay. Thank you. I'll issue a
24 Scheduling Order. Thank you. Bye-bye.

25 (Whereupon, the matter is adjourned.)

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C E R T I F I C A T E

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I, Carole Ludwig, certify that the foregoing
transcript of proceedings in the case of Averbach et al
v. Cairo Amman Bank, Docket #19-cv-00004-GHW-KHP, was
prepared using digital transcription software and is a
true and accurate record of the proceedings.

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Signature _____

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Carole Ludwig

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Date: January 23, 2023

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